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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDWIN MICHAEL LYBARGER, Appellant.	)	2 CA-CR 2011-0070 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101919001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Edwin Lybarger was convicted of felony criminal damage stemming from a traffic accident. The trial court suspended the imposition of sentence and placed Lybarger on a six-month term of probation. On appeal, Lybarger argues (1) insufficient evidence supports his conviction, (2) the trial court erred in failing to instruct the jury on criminal negligence, and (3) his conviction violates substantive due process. Finding no error, we affirm.

Factual and Procedural Background

¶2 The evidence, viewed in the light most favorable to upholding the verdict, establishes the following facts. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the evening of June 8, 2009, Lybarger was driving his vehicle in "bumper to bumper traffic." Earlier that day he had taken oxycodone prescribed for his pain, and a blood test revealed he had 34 nanograms of oxycodone per milliliter of blood around the time of the accident. He also was wearing three transdermal patches containing fentanyl, which is another prescription pain medication.

¶3 When the vehicles traveling in Lybarger's direction were stopped at the red light of an intersection, he changed lanes into a space in front of a commercial truck. He then paused momentarily and checked for oncoming cars in the next lane to the right. Lybarger later testified, as did several eyewitnesses, that he could not see around this truck to determine if any vehicles were approaching from behind in the right-turn lane. Nevertheless, Lybarger proceeded into this lane, causing a motorist to crash into his vehicle. The fifteen-mile-per-hour impact resulted in approximately $9,800 in damages to the victim's car.

¶4 A witness who assisted Lybarger in moving his vehicle off the road described him as appearing "medicated" and exhibiting "slow" speech and movements. When Lybarger was standing beside his car after the accident, he stated he did not feel well and collapsed onto his side. During subsequent questioning by a police officer, Lybarger offered "confused" answers about the direction he had been traveling. At first he claimed he was going left at the intersection but, after some discussion, he changed his statement and reported he had been turning right. Lybarger ultimately testified that he had decided to turn right in order to go to a nearby car dealership to look for a car to buy for his wife.

¶5 A Pima County grand jury charged Lybarger with four offenses: criminal damage above $2,000 but less than $10,000 (count one), endangerment (count two), driving under the influence of drugs while impaired to the slightest degree (count three), and driving with a controlled drug or its metabolite in his system (count four). Because Lybarger had valid prescriptions for the pain medications he was taking at the time of the accident, the trial court granted the state's pretrial motion to dismiss count four. After the state rested its case, the court granted a judgment of acquittal on the endangerment count, finding the state had presented no evidence that Lybarger's actions had created a risk of imminent death or serious bodily injury. The court allowed the remaining charges to be submitted to the jury. The jury acquitted Lybarger of driving under the influence of drugs (DUI) but found him guilty of criminal damage. Lybarger then filed a renewed motion under Rule 20(b), Ariz. R. Crim. P., and a motion for a new trial, both of which the court denied.

¶6 Before sentencing, the trial court reduced Lybarger's offense from a class five felony to a class six felony, giving him the benefit of an error in the jury's verdict form relating to the amount of damages proven by the state. The court suspended the imposition of sentence and placed Lybarger on six months' probation. The court also ordered that Lybarger forfeit his firearms as a consequence of his felony conviction. This appeal followed.

Sufficiency of the Evidence

¶7 Lybarger first argues his criminal damage conviction should be vacated and judgment entered in his favor because the evidence presented below "was insufficient to meet the legal definition of recklessness" necessary to sustain the conviction. A motion for a judgment of acquittal under Rule 20 is designed to test the sufficiency of the evidence, *State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984), and the same legal standard applies to pre- and post-verdict motions. *State v. West*, 226 Ariz. 559, ¶ 14, 250 P.3d 1188, 1191 (2011). "[T]he controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'" *Id.*, *quoting* Ariz. R. Crim. P. 20(a). On appeal, a reviewing court must determine de novo whether sufficient evidence supports every element of the offense. *Id.* ¶¶ 15-16.

¶8 Criminal damage, as it was charged here, requires proof that a defendant "recklessly" defaced or damaged another person's property. A.R.S. § 13-1602(A)(1).[1] Our code defines this culpable mental state as follows:

[1]This subsection has not been altered since Lybarger committed the offense. *See* 1996 Ariz. Sess. Laws, ch. 361, § 2.

> "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

A.R.S. § 13-105(10)(c).

¶9 As he argued below, Lybarger maintains "the verdicts were clearly contradictory." Because he was acquitted of DUI, Lybarger concludes the jury necessarily convicted him based on mere negligent driving of the type that may be seen on our roads every day. And ordinary civil negligence, as he points out, is not enough to establish recklessness. *See In re William G.*, 192 Ariz. 208, 212, 963 P.2d 287, 291 (App. 1997).

¶10 We are inclined to agree with Lybarger that, absent any evidence of impairment here, his admittedly negligent traffic maneuvers did not amount to a gross deviation necessary to sustain the conviction. *See id.* at 215, 963 P.2d at 294 ("[T]he deviation from acceptable behavior required for recklessness must be markedly greater than the mere inadvertence or heedlessness sufficient for civil negligence."); *see also State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 108, 228 P.3d 909, 936 (App. 2010). But Lybarger overlooks the fact that his acquittal of DUI is irrelevant to determining the sufficiency of the evidence supporting his criminal damage conviction. In short, we draw no conclusions whatsoever from his acquittal.

¶11 "Sufficiency-of-the[-]evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt." *United States v. Powell*, 469 U.S. 57, 67 (1984). Such review "should be independent of the jury's determination that evidence on another count was insufficient" and "should not be confused with the problems caused by inconsistent verdicts." *Id.* We disregard an acquittal in this manner because we recognize that, "in the privacy of the jury room," either "leniency or compromise" may lead jurors to acquit a defendant whom they believe to be guilty. *State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969). We therefore do not presume "some error . . . worked against [a defendant]," *Powell*, 469 U.S. at 66, and we make no assumptions as to what "the jury 'really meant'" by its acquittal when determining the sufficiency of evidence supporting another charge. *Id.* at 68.

¶12 The standard to be applied here "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). The substantial evidence necessary to sustain a conviction may be circumstantial or direct. *Id.* If "'reasonable minds may differ on inferences drawn from the facts,'" the conviction must be upheld. *Id.* ¶ 18, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶13 As Lybarger acknowledges, impairment by drugs or alcohol can serve as the basis for a recklessness finding. *Cf. Belliard v. Becker*, 216 Ariz. 356, ¶¶ 14, 16, 166

P.3d 911, 913-14 (App. 2007) (concluding alcohol consumption relevant to question of recklessness for punitive damages). Accordingly, we adopt the state's position that

> because a rational juror could conclude . . . (1) driving into an adjacent lane in heavy traffic when one's view is blocked, and (2) driving while taking painkillers such that one appears "confused" and "medicated" creates a substantial and unjustifiable risk of damage to another's vehicle, constituting a gross deviation from the standard of care a reasonable person would observe, substantial evidence supported the jury's verdict.

¶14 Lybarger maintains his post-accident appearance and behavior could be explained by something other than his medication—namely, by the summer heat and his physical exertion in pushing his car off the road. But because reasonable minds could differ about the inferences to be drawn from the evidence, we must affirm the conviction. Circumstantial evidence supported a finding that Lybarger's medication impaired either his ability to drive or to make decisions, causing him to disregard the substantial risk of property damage his unjustifiable conduct posed. *See State v. Miller*, 226 Ariz. 190, ¶¶ 9-10, 245 P.3d 454, 456 (App. 2011) (finding DUI statute prohibits driving with either impaired judgment or ability). Sufficient evidence thus supports the conviction and the trial court's Rule 20 ruling.

¶15 We further note that Lybarger repeatedly refers to the "weight" of the evidence in his opening brief, suggesting he also challenges the denial of his motion for a new trial. *See Lee*, 189 Ariz. at 615, 944 P.2d at 1229 ("When the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence."). At the trial court level, a motion for a new trial made pursuant to Rule 24.1(c)(1), Ariz. R.

Crim. P., requires the court to reweigh the evidence and serve as a "'thirteenth juror.'" *West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192, *quoting Peak v. Acuña*, 203 Ariz. 83, ¶ 9, 50 P.3d 833, 835 (2002). On appeal, however, the denial of such a motion presents no questions distinct from the denial of a Rule 20 motion. "[A] court errs in denying . . . a motion [for new trial] 'only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.'" *State v. Davis*, 226 Ariz. 97, ¶ 6, 244 P.3d 101, 103 (App. 2010), *quoting State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Thus, to the extent Lybarger now challenges the court's Rule 24.1 ruling, we deny relief on the merits.

Jury Instruction

¶16 Lybarger next argues the trial court erred in denying his request for a jury instruction on the mental state of criminal negligence as it is defined in A.R.S. § 13-105(10)(d). During the settlement of jury instructions on the third day of trial, Lybarger presented the court with the following request:

> [Lybarger]: How about a criminal negligence instruction?
>
> THE COURT: For what?
>
> [Lybarger]: Criminal negligence instruction.
>
> THE COURT: There's nothing—
>
> [Lybarger]: So they can compare the two requisites.
>
> THE COURT: I'm not going to give them to compare. If there was something that involved criminal negligence I would give them the instruction, but I'm not going to give it so they can compare . . . .

¶17 Rule 21.2, Ariz. R. Crim. P., requires that requests for jury instructions be submitted to the trial court in writing. Here, Lybarger failed to include a criminal negligence instruction among his written requests, thus depriving the court of the opportunity to carefully consider and rule upon his request. Although Lybarger since has clarified and elaborated on the reason behind his request in his opening brief, his terse and informal request was insufficient to preserve the argument for appeal. *See State v. Kinney*, 225 Ariz. 550, ¶ 7, 241 P.3d 914, 918 (App. 2010) ("To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue.").

¶18 We will not disturb a jury's verdict when a trial court's instructions, viewed in their entirety, adequately set forth the law applicable to the case. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009-10 (1998). As the court correctly observed here, criminal damage does not involve the mental state of criminal negligence. *See* A.R.S. § 13-1602(A). The instructions given here thus adequately reflected the law. *See Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009-10.

¶19 We acknowledge that an instruction on criminal negligence could have been useful here to clarify the mental state of recklessness that was at issue and to give the jury a better understanding of Lybarger's defense. *Cf. State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (defining proof "beyond a reasonable doubt," in part, by contrasting it with preponderance-of-evidence standard). Yet a trial court need not give every specific instruction requested by a defendant. *Rodriguez*, 192 Ariz. 58, ¶ 16,

961 P.2d at 1009. We therefore find no error, fundamental or otherwise, in the court's denial of the requested criminal negligence instruction.

Due Process

¶20 Finally, Lybarger maintains that his felony conviction for criminal damage has deprived him of "substantive due process." As we understand his argument, Lybarger claims that his felony conviction, as well as his resulting deprivation of firearms, was "clearly arbitrary and excessive" under the facts of his case. He contends the proper test for deciding these issues is set forth in *Large v. Superior Court*, 148 Ariz. 229, 235-36, 714 P.2d 399, 405-06 (1986). Assuming without deciding that Lybarger is correct on this point, we would deny relief even under this standard.

¶21 As noted above, we have rejected Lybarger's premise that his acquittal of DUI established he was not impaired by his medication while driving. We thus do not find the felony designation of his offense to be excessive under the facts of his case. *See id.* at 236-37, 714 P.2d at 406-07 ("Due process simply requires that government deprivation of a liberty interest be both substantially related to the purpose it is to serve and not excessive in response to the problem addressed."). Furthermore, we have previously recognized that "a felony conviction . . . can reasonably be found to indicate unfitness to engage in the future activity of possession of a firearm." *State v. Olvera*, 191 Ariz. 75, 77, 952 P.2d 313, 315 (App. 1997). We find nothing arbitrary or excessive about the deprivation of the right to bear arms here, given Lybarger's reckless behavior and the state's interest in "secur[ing] the safety of [its] citizens." *Id.*

Conclusion

¶22 For the foregoing reasons, Lybarger's conviction and disposition are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge